(3)

No. 03-995

Supreme Court, U.S.
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In The

Supreme Court of the United States

WORDS, INC.,

Petitioner,

v.

NORMAN H. SINGER, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Brief in Opposition to Petition for Writ of Certiorari

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2003

No. 03-995

WORDS, INC.

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NORMAN H. SINGER, et al.

Respondents.

On Petition for Writ of Certiorari to the
District of Columbia Court of Appeals

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Norman H. Singer; Piper, Marbury, Rudnick, Wolfe, LLP; Jackson & Campbell, P.C.; Singer & Associates, P.C. (together, the "Respondents"), respectfully request that this Court deny the Petition for Writ of Certiorari (the "Petition") filed by Petitioner, Words, Inc. ("Words" or "Petitioner").

OPINIONS BELOW

The Opinion of the District of Columbia Court of Appeals dismissing Petitioner's appeal to that Court is reported at 870 A.2d 910 (2002) and is reproduced in Petitioner's Appendix commencing at page 49. That same Court's Order denying Petitioner's "Motion to Invoke Appeal Jurisdiction" and first Petition for Rehearing and Rehearing *En Banc* is reproduced in Petitioner's Appendix at page 52. The District of Columbia Court of Appeals' Order denying Petitioner's second Petition for Rehearing and Rehearing *En Banc* is reproduced in Petitioner's Appendix at page 53.

The decision of the Superior Court of the District of Columbia granting summary judgment in favor of Respondents is reproduced in Petitioner's Appendix commencing at page 17. The Superior Court's Order denying Petitioner's "Rule 59(e) Motion to Alter and Amend Judgment and to Correct Summary Judgment Record Pursuant to Rule 60(a)" is reproduced in Petitioner's Appendix commencing at page 41. References below to the decisions and orders of the lower courts are to the appropriate page of the Petitioner's Appendix and are designated as "Pet. App."

JURISDICTION

This Court lacks jurisdiction to grant the Petition for two separate reasons. First, the Petition, and Petitioner's Application for an extension of time to file the Petition, were not filed within the 90 day time

required by 28 U.S.C. § 2101(c). Second, 28 U.S.C. § 1257 does not support jurisdiction here because the judgment below is not based upon the resolution of a federal question, but rather rests upon non-federal grounds involving the District of Columbia Court of Appeals' interpretation of its own rules of appellate procedure and the jurisdiction of that Court to entertain appeals from the Superior Court of the District of Columbia.

STATUTORY PROVISIONS

28 U.S.C. § 1257:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 U.S.C. § 2101:

* * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

* * *

STATEMENT OF THE CASE[1]

Petitioner filed a legal malpractice action against Respondents in the Superior Court of the District of Columbia. After a hearing held on April 3, 2002, the Superior Court, on May 15, 2002, issued a Memorandum Opinion and Order (the "May 15, 2002 Summary Judgment Order") granting Respondents' Motions for Summary Judgment against Petitioner, entering final judgment in favor of each Respondent and denying Petitioner's own dispositive motion. Pet. App. 17-34. The May 15, 2002 Summary Judgment Order was entered on the docket of the Superior Court on May 16, 2002.

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[1] Respondents present their own Statement of the Case because they do not believe that Petitioner's Statement of the Case fully and accurately reflects the proceedings below. *See* Sup. Ct. Rule 15.1.

Thereafter, on May 30, 2002, Petitioner filed a motion entitled "Plaintiff's Rule 59(e) Motion to Alter and Amend Judgment and to Correct Summary Judgment Record Pursuant to Rule 60(a)" (the "Post-Summary Judgment Motion").[2] Pet. App. 35-37. In the Post-Summary Judgment Motion, Petitioner, implying some impropriety on the part of the trial judge, requested that the trial judge explain "for the record the reasons for and nature of any apparent ex parte telephone communications by the Court" with counsel for Respondent, Jackson & Campbell, P.C. Pet. App. 35. Petitioner also sought permission from the trial court to supplement the record on appeal with evidence (documents) not submitted by Petitioner in briefing the summary judgment motions and which, therefore, were not considered by the trial court in its summary judgment rulings. Pet. App. 36-37.

On September 3, 2002, an Order was entered, *inter alia*, denying Petitioner's Post-Summary Judgment Motion. Pet. App. 41-48. In its Order, the trial court denied permission for Petitioner to "enlarge a record by subsequent inclusion of material from which [Petitioner] has purposely excerpted selected segments (comprising ten pages out of 135 pages referring to an additional 1,500 pages of reports and summaries). . . ." Pet. App. 44. Regarding its communications with counsel, the trial court explained that it communicated

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[2] Following the hearing on the summary judgment motions, but before the issuance of the Summary Judgment Order, Petitioner moved for leave to file a First Amended Complaint. On May 30, 2002, Petitioner filed a Notice of Voluntary Dismissal (the "Notice of Dismissal"), the effect of which was to withdraw the Motion for Leave to File an Amended Complaint. *See* Pet. App. 39-40.

with counsel for the administrative purpose of obtaining counsel's assistance in scheduling a telephone conference with all of the parties' counsel and a motions hearing. Pet. App. 46.

Petitioner filed its Notice of Appeal of the May 15, 2002 Summary Judgment Order on September 27, 2002. Respondents subsequently moved to dismiss the appeal because Petitioner's Notice of Appeal was not filed within thirty days after entry of judgment by the District of Columbia Superior Court and because Petitioner's Post-Summary Judgment Motion was not one of those specific motions which tolled the period for filing a notice of appeal. *See* D.C. Ct. App. R. 4(a)(2); *see also* D.C. Ct. App. R. 4(a)(1) (requiring that appeals be filed within thirty days after entry of the judgment from which the appeal is taken). On November 27, 2002, a three judge panel of the District of Columbia Court of Appeals entered an order finding that Petitioner's appeal to that Court was not timely filed. Pet. App. 49-51. As a result, the Court of Appeals held it lacked jurisdiction over the appeal and, therefore, dismissed the appeal. Pet. App. 51.

Thereafter, on December 11, 2002, Words filed a Petition for Rehearing and Rehearing *En Banc* (the "First Petition for Rehearing"), as permitted by D.C. Ct. App. R. 40. In the First Petition for Rehearing, Words, for the first time, argued that the Post-Summary Judgment Motion and the Notice of Dismissal satisfied the requirement in Rule 3 of the Rules of the District of Columbia Court of Appeals that an appeal shall be "taken by filing a notice of appeal with the Clerk of the Superior Court . . . ." The First Petition for Rehearing

was denied by the District of Columbia Court of Appeals on February 28, 2003. Pet. App. 52. Notwithstanding that the District of Columbia Court of Appeals' rules contemplate the filing of only one request for rehearing, Words, on March 12, 2002, filed a second Petition for Rehearing and Rehearing *En Banc* (the "Second Petition for Rehearing"). The Second Petition for Rehearing was denied on June 26, 2003. Pet. App. 53.

On September 12, 2003, Petitioner applied to Chief Justice Rehnquist for an extension of time of sixty days to file its Petition for Writ of Certiorari (the "Application for Extension"). The Application for Extension was granted on September 17, 2003. Words filed its Petition for Writ of Certiorari on October 24, 2003.

The Application for Extension was filed more than ninety days after the District of Columbia Court of Appeals denied Words' First Petition for Rehearing. Supreme Court Rule 13.5 requires that an application for extension of time be filed "at least 10 days before the date the petition is due, except in extraordinary circumstances." The Application for Extension (and therefore Words' Petition for Writ of Certiorari) can only be considered timely if the filing of Words' Second Petition for Rehearing before the District of Columbia Court of Appeals operated to toll the time for filing a petition for certiorari with this Court. Because it did not, this Court lacked jurisdiction over this matter at the time the Application for Extension was granted and the Petition must be denied as untimely. The Petition must also be denied because it does not present a federal question.

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILED TO APPLY FOR A WRIT OF CERTIORARI WITHIN NINETY DAYS AFTER THE ENTRY OF THE JUDGMENT BELOW, LEAVING THIS COURT WITHOUT JURISDICTION OVER THIS MATTER.

In accordance with 28 U.S.C. § 2101(c), a petition for writ of certiorari in a civil action must be filed within ninety days after the entry of judgment. The ninety-day period for making application to this Court for a writ of certiorari is "mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).[3] A petition that is not timely filed must, therefore, be dismissed. *Id.*[4]

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[3] For good cause shown, the ninety day period may be extended for a period not exceeding sixty days by application to a Justice of this Court. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.5.

[4] This Court has long-recognized that the federal statutes which limit the Supreme Court's jurisdiction to "those cases where review is sought within a prescribed period" reflect a public policy that litigation must at some definite point be brought to an end. *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 213 (1952); *see also Matton Steamboat Co., Inc. v. Murphy*, 319 U.S. 412, 415 (1943) ("The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands."); *Department of Banking of Neb. v. Pink*, 317 U.S. 264, 268 (1942); *cf. Browder v. Director, Dep't of Corrections of Ill.*, 434 U.S. 257, 265 (1978) (the same principle applies to appeals from the District Courts to the Circuit Courts of Appeals).

A timely filed request for rehearing filed with a state or lower federal court tolls the ninety-day period for filing a petition for writ of certiorari with this Court "until rehearing is denied or a new judgment is entered on the rehearing." *Jenkins*, 495 U.S. at 45 (citing *Department of Banking, State of Neb. v. Pink*, 317 U.S. 264, 266 (1942)); Sup. Ct. R. 13.3; *accord Gypsy Oil Co. v. Escoe*, 275 U.S. 498, 498-99 (1927); *Morse v. United States*, 270 U.S. 151, 154 (1926) ("The suspension of the running of the period limited for the allowance of an appeal, after a judgment has been entered, depends upon the due and seasonable filing of the motion for a new trial or the petition for rehearing.").

The time for filing a petition for certiorari, however, is not tolled by "[t]he filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied . . . ." *Bowman v. Lopereno*, 311 U.S. 262, 266 (1940). In that same regard, the ninety-day period is not suspended by "the mere presentation of a motion for leave to file a second request for rehearing" unless such a motion is "actually entertained by the court. . . ." *Gypsy Oil*, 275 U.S. at 499.

Thus, in *Gypsy Oil*, this Court denied as untimely a petition for certiorari that was filed more than ninety days after the denial of a petition for rehearing by the Supreme Court of Oklahoma (but within ninety days after the denial of an application for leave to file a second petition for rehearing). 275 U.S. at 498-99. Remaining steadfast to the principle that the time for filing a petition for certiorari is jurisdictional,

this Court, in *Matton Steamboat, supra,* refused to allow the "[w]ould-be appellants [to] prolong indefinitely the appeal period, by making application [for appeal] to one judge within the three months and upon its denial by applying successively to other judges even after the prescribed time for appeal has ended." 319 U.S. at 415. There, the Court held that it was without jurisdiction to entertain an appeal from a state court. *Id.*

Other decisions by this Court have also upheld the policy of bringing finality to litigation when would-be appellants do not act with the requisite diligence in petitioning for certiorari. *See, e.g., Federal Trade Comm'n, supra,* 344 U.S. at 211-13 (dismissing as untimely petition for writ of certiorari not filed within ninety days of the entry of judgment by the Seventh Circuit Court of Appeals, and holding that the time period for filing a petition did not run anew from the circuit court's later decision which, in substance, did not disturb or revise legal rights and obligations that were settled with finality in its prior judgment); *Pink, supra,* 317 U.S. at 265-68 (dismissing petition for certiorari as untimely because a motion to the Supreme Court of New York that it amend its remittitur by adding to it a statement that a federal question was presented and passed upon by that court did not toll the time for filing a petition for certiorari to the United States Supreme Court); *Morse,* 270 U.S. at 154 (dismissing appeal as untimely because the Rules of the Court of Claims did not allow for the filing of a second motion for new trial and, therefore, the second motion could not have been "duly and seasonably filed. . . .").

The Rules of the District of Columbia Court of Appeals allow a party just one opportunity to request a rehearing of motions decided by that Court. D.C. Ct. App. R. 40. Thus, Words had exhausted all of its remedies before that Court upon the denial of the First Petition for Rehearing on February 28, 2003. As a result, as of that date, proceedings before the District of Columbia Court of Appeals were final and the time for filing a petition for writ of certiorari to this Court began to run. *See Pink*, 317 U.S. at 268 (proceedings before a lower court are final and the time for filing a petition for writ of certiorari begins to run when "the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review by a state court."). The time for filing a petition for writ of certiorari was not further tolled by the filing of the Second Petition for Rehearing because the Second Petition was not entertained or considered on its merits. Indeed, because the rules of the District of Columbia Court of Appeals did not allow for the filing of a second petition for rehearing, Words' Second Petition for Rehearing could not have been "duly and seasonably filed. . . ." *Cf. Morse*, 270 U.S. at 154.

The time for filing a petition for writ of certiorari with this Court began to run on March 1, 2003 and expired ninety days later, on May 29, 2003. Thus, the time for filing a petition for writ of certiorari had run, and this Court lacked jurisdiction over this matter, when Words submitted its Application for Extension on September 12, 2003. Accordingly, the Petition must be denied.

II. THIS COURT LACKS JURISDICTION OVER THIS MATTER BECAUSE THE DISTRICT OF COLUMBIA COURT OF APPEALS' DISMISSAL OF PETITIONER'S APPEAL TO THAT COURT RESTED EXCLUSIVELY ON NON-FEDERAL GROUNDS.

Words' appeal to the District of Columbia Court of Appeals was dismissed because the appeal to that court was not filed in a timely fashion, leaving the Court of Appeals without jurisdiction to consider the case. Pet. App. 51. Words' Petition to this Court may be granted only if a federal question was raised by the proceedings below. 28 U.S.C. § 1257; *see also* Sup. Ct. R. 10(b)-(c) (consideration will be given to cases from state courts in which an important federal question has been decided).

As described by this Court in *Pernell v. Southall Realty*, 416 U.S. 363 (1974), pursuant to the District of Columbia Court Reform and Criminal Procedure Act of 1970,[5] the District of Columbia court system was restructured "so that 'the District will have a court system comparable to those of the states and other large municipalities.'" 416 U.S. at 367 (quoting H.R. Report No. 91-907, p. 23 (1970)). Section 11-743 of the D.C. Code, passed by Congress as part of the Court Reform Act, provides that the District of Columbia Court of Appeals "shall conduct its business according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modifications of those Rules." D.C. Code § 11-743.

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5 Pub. L. 91-358; 84 Stat. 473 (codified at D.C. Code tit. 11).

Going forward from the date of the enactment of § 11-743, the statute plainly allows the Court of Appeals the complete discretion and authority that the highest court of any state would have to promulgate and interpret its own rules of procedure. Thus, the Court of Appeals, in its discretion, may continue to follow the Federal Rules as the rules of procedure before that court, or modify them in toto or in part, as that court deems appropriate. Section 11-743 gives rule-making authority to the Court of Appeals, thus making issues of court procedure and rule interpretation in the District of Columbia Court system matters of local concern, over which this Court has no jurisdiction. Indeed, this Court has long-recognized that it lacks jurisdiction to interpret states' interpretations of their own rules of procedure, even when such rules are modeled after federal rules. *See Herb v. Pitcairn*, 324 U.S. 117, 120 (1945) ("Whether any case is pending in the Illinois courts is a question to be determined by Illinois law, as interpreted by the Illinois Supreme Court."); *Miller v. Anderson*, 150 U.S. 132, 136-37 (1893) ("A state may prescribe the procedure in the federal courts as the rule of practice in its own tribunals; . . . and in such cases an examination may be necessary of the acts of congress, [and] the rules of the federal courts, . . . and yet the questions for decision would not be of a federal character."); *see also Griffin v. United States*, 336 U.S. 704, 717 (1948) (". . . it has become settled practice for this Court to recognize that the formulation of rules of evidence for the District of Columbia is a matter purely of local law to be

determined - in the absence of specific Congressional legislation - by the highest appellate court for the District.").[6]

Petitioner does not - and, indeed, cannot - assert that its underlying claim of legal malpractice raised a federal question. Nor does Petitioner claim that some federal right of Words was infringed at any stage of the proceedings below. Rather, Petitioner argues that because the Rules of the District of Columbia Court of Appeals are modeled after the Federal Rules of Appellate Procedure, the Court of Appeals, in construing Rules 3 and 4 of procedure before that court, was required to follow the federal courts' interpretation of the parallel federal rules, which interpretations (according to Words) compelled a different result below.

Because the rules of procedure before the Court of Appeals were modeled after the Federal Rules of the Appellate Procedure, the Court of Appeals considers federal courts' interpretations of the federal rules as persuasive, but not binding, authority in interpreting similar District of Columbia rules. *Tupling v. Britton,* 411 A.2d 349, 351 (D.C. 1980) ("While this court is not

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[6] This Court, in *Pernell, supra,* stated that "decisions of the District of Columbia Court of Appeals on matters of local law - both common law and statutory law - will be treated by this Court in a manner similar to the way in which we treat decisions of the highest court of a State on questions of state law." 416 U.S. at 368; *see also United States v. Dixon,* 509 U.S. 688, 701 n.6 (1993) (noting that the Court ordinarily accepts the construction of a District of Columbia law adopted by the District of Columbia Court of Appeals).

bound by the federal courts' interpretations of federal rules essentially identical or similar to our rules, *those interpretations may be accepted as persuasive authority* in interpreting our rules.") (emphasis added). No statute, rule or decisional authority from the District of Columbia requires that federal courts' interpretations of the federal rules be accepted (or considered) by the District of Columbia Court of Appeals in interpreting its own rules.

This Court lacks jurisdiction to review a state court's decision when the state court "chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions," and the federal precedents "do not themselves compel the result that the court has reached." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Because the issue was not raised by Words until the filing of its First Petition for Rehearing before the Court of Appeals, the Court of Appeals' published decision dismissing Words' appeal as untimely does not address whether the Post-Summary Judgment Motion and the Notice of Dismissal are sufficient substitutes for a proper Notice of Appeal, and the Court of Appeals did not explicitly set forth its reasons for the court's subsequent denials of the Petitions for Rehearing. Pet. App. 52-53. Under *Long*, this Court lacks jurisdiction over this matter because the Court of Appeals chose not to rely on federal precedent in disposing of Words' appeal to that Court. Jurisdiction would be lacking even if the rule of construction espoused by the Court of Appeals in *Tupling* is deemed to have necessarily guided the Court of Appeals' dismissal of Words' appeal and its denial of the Petitions for Rehearing, because the federal courts'

interpretations of Rules 3 and 4 of the Federal Rules of Appellate Procedure would only be persuasive, and not binding authority on the Court of Appeals.

The District of Columbia Court of Appeals' dismissal of Words' appeal was based on that court's own procedural rules. The Court of Appeals held simply that Petitioner failed to comply with procedural requirements that were to be followed in order to pursue Petitioner's state law claim on appeal. The Court of Appeals (1) did not explicitly rely on federal precedent in disposing of Petitioner's state law claim; (2) was not constrained to review any federal precedent; and (3) to the extent that it did review federal precedent, the Court of Appeals was not required to accept the federal precedent as binding. In short, the decision below rested solely on a state court's interpretation of a state court rule of procedure in connection with the disposition of a state law claim. The Petition does not raise a federal question and this Court, therefore, lacks jurisdiction to grant the Petition.[7]

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[7] Jurisdiction would be lacking here even if some federal claim brought by Words was forfeited as a result of a violation of a state procedural rule, where the state-law ground for dismissal was "'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989). This rule is consistent with this Court's recognition of "the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (barring consideration of habeas corpus claim following a default under state procedural rules, absent actual prejudice as a result of a violation of federal law or a fundamental miscarriage of justice.)

CONCLUSION

For these reasons, this Court should deny the Petition for Writ of Certiorari filed by Petitioner, Words, Inc.

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